

Before It's Too Late

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Dear President von der Leyen,

In your recent State of the Union address, you rightly emphasized that “[breaches of the rule of law cannot be tolerated](#).”

We are sorry to say we are seeing ample evidence to the contrary (see our previous open letters [here](#) and [here](#)).

The current Commission is failing to project any sense of urgency (at least, in public view) around this issue, while Polish authorities continue to openly abuse, harass and intimidate judges and prosecutors who are seeking to defend the rule of law. In addition, Polish authorities continue to openly defy the authority of the Court of Justice by refusing to follow its judgments, most recently its [order regarding the so-called Disciplinary Chamber](#).

Persecution of independent judges and prosecutors

With respect to judges and prosecutors, it is difficult to know where to begin considering the large number of judges and prosecutors being persecuted by Poland's current authorities. We are disappointed to see that even the most alarming examples have yet to generate any public reaction from the Commission. Let us for instance draw your attention to the situation of [Judge Igor Tuleya](#) who has been called to attend yet another hearing before this “Disciplinary Chamber” on October 5th in violation of the Court of Justice's order suspending the application of the legal provisions that allow this body to handle disciplinary cases concerning judges.

As your Commission is already well aware, this “Disciplinary Chamber” was set up in flagrant violation of Poland's own Constitution and after [last November's ECJ judgment](#) it also violates EU law requirements relating to judicial independence and impartiality. The “Disciplinary Chamber” has already shown its eagerness to help the government harass and persecute judges who are independently fulfilling their duties, of whom Judge Tuleya is a leading example. Obviously, Poland will not stop harassing independent judges until the Commission lets Polish authorities know in no uncertain terms that violation of an ECJ order will not be tolerated.

This is far from the only case in which the “Disciplinary Chamber” is being used to intimidate independent judges. [Judge Beata Morawiec](#) who is the president of [Themis](#) (the second largest association of judges in Poland), was recently threatened with a home search following a decision issued by the internal affairs department of the National Public Prosecutor's Office. This office, established to investigate judges and prosecutors in order to refer them to the “Disciplinary

Chamber,” lacks any degree of operational and investigative independence in breach of EU law. It [operates instead hand in glove with Polish authorities](#) as does the “Disciplinary Chamber” which is due to consider the removal of Judge Morawiec’s judicial immunity on October 12th. One should note, in passing, that the judge-rapporteur in this case is the very person who violated EU law when he supported the suspension of [Judge Paweł Juszczyszyn for the “crime” of applying the AK judgment of the Court of Justice](#).

What these examples reveal is that judges who are attempting to apply EU law are being threatened and punished while those who flaunt violations of EU law are being rewarded. This is a situation that cannot stand in a Union supposedly based on the rule of law.

These cases would be bad enough on their own, but they are made worse by the fact they are not unique to judges, as [prosecutors have been subject to similar harassment](#). There are multiple, patently arbitrary disciplinary proceedings that have been recently initiated against prosecutors who are not toeing the party line, [with many having already been ousted or demoted](#). Most recently, [Prosecutor Krzysztof Parchimowicz](#) has been the subject of another politically motivated disciplinary action. His “crime” was [attending the disciplinary hearings organised for another prosecutor](#) who had fallen out of favour because she dared to criticise the Polish government’s so-called “reforms”. The Court of Justice has already established that these “reforms” are in fact [deliberate attacks on judicial independence](#). Now not only those who criticise the reforms, but also those who stand up for the critics are being punished in this process that the Court of Justice has already declared – and will continue to declare – to be contrary to EU Law. Or, at least the Court of Justice can be expected to declare this, provided that infringement actions are lodged with it by your Commission to provide an opportunity for the Court to say so.

In yet another example of arbitrary disciplinary proceedings, Prosecutor Ewa Wrzosek is being harassed for [launching an investigation into the presidential elections](#) the government sought to organise in blatant breach of Poland’s Constitution and regardless of the impact it may have on the life and health of Polish citizens. Originally scheduled for 10 May 2020, these elections were postponed four days before the scheduled date. As you will recall, these are elections whose legality and constitutionality [were rightly questioned by Commissioner Jourova](#). Prosecutor Wrzosek [only became aware of the disciplinary investigation initiated against her when it was revealed in the media](#), following a leak originating from services controlled by the Minister of Justice. This is not the first time this happened as indeed, the same trick was used in respect of Judge Morawiec. The Ministry of Justice, whose interference in appointment of judges to the “Disciplinary Chamber” has already been found [contrary to EU law](#), has been the source of leaks that are designed to unsettle and threaten judges and prosecutors who attempt to enforce EU law.

The disciplining of judges and prosecutors for attempting to uphold the rule of law is happening while Polish authorities have done nothing whatsoever following the revelation of the existence of a [secret “troll farm” hosted within the Ministry of Justice](#)

which was used to smear members of the judiciary via inter alia the (criminal) leaking of confidential information. The persons responsible for this (criminal) entity are now merely investigating themselves in violation of [PACE's call for Polish authorities to establish no later than 31 March 2020](#) an independent public commission to conduct an independent investigation in the matter. The real rule of law violators are therefore escaping any sanction while those who defend the rule of law are being punished.

Systemic violation of the Court of Justice's rulings

As regards the systemic violation of the Court of Justice's rulings, without being exhaustive, we must draw your attention to the fact that Polish authorities, primarily via the bodies they have unlawfully captured, are not only continuing to violate the [Court of Justice's order of 8 April 2020](#) by allowing the theoretically suspended "Disciplinary Chamber" to continue to schedule hearings as noted above. They have also acted to prevent compliance [with the AK judgment as well as the Simpson judgment of the Court of Justice](#) so as to continue with their unlawful appointments of politically dependent individuals to senior judicial positions.

In addition, the [muzzle law of 20 December 2019](#) has legalised the structural violation of most fundamental principles underlying the whole EU legal order. The Commission itself has recognised the gravity of the situation when it (*belatedly*) [launched an infringement action on 29 April 2020](#) by highlighting the fact that the new muzzle law inter alia prevents Polish courts from fulfilling their obligation to apply EU law; and from fulfilling their obligation to request preliminary rulings from the EU Court of Justice and from assessing, in the context of cases pending before them, the power to adjudicate cases by other judges. Under the muzzle law, any Polish judge who would seek to remedy the situation could then be sanctioned and ultimately dismissed. Here again, it is the judges who attempt to enforce EU law who are being punished while those who undermine EU law are not being restrained by Commission enforcement of EU law.

Cumulatively, it is difficult to think in the whole history of the EU of a more blatant, deliberate and systemic violation of the principle of primacy of EU law, the functioning of the preliminary ruling mechanism as well as the requirements of judicial independence. In essence, Poland has *already* exited the EU's legal order and yet your Commission is seemingly focusing its energy and limited resources on the production of yet more reports which will not change the situation on the ground by one iota unless you begin actually enforcing EU law rather than simply pointing without effect or real urgency to the sorry state of affairs.

La coupe est pleine and we urge you *once more* to *promptly* and *meaningfully* act before the point of no return is reached.

Indeed, as V#ra Jourová and Didier Reynders have both correctly pointed out, we are not dealing with "judicial reforms" but are facing "[a case of carpet bombing](#)" which aims to annihilate [judicial independence](#) and scares all judges into submission.

What would the point of no return look like?

Other Member States' courts have, appropriately, already begun to doubt whether they can trust the operation of the Polish courts. So far this has been limited to [refusals to comply with European Arrest Warrants originating from Poland](#), but will soon spread to the refusal of other Member States' courts to enforce Polish judgments across the board and may lead to more non-EU countries to end [their cooperation in the justice sector with Poland](#).

The primary principle of the EU legal order – that EU law can reliably be enforced anywhere in the Union – will have become irreparably damaged. Self-help – blocked by the Treaties – will suddenly become the only way that Member States can defend themselves from a rogue state in their midst. The Commission has been given the necessary enforcement powers under the Treaties precisely because it is supposed to act to prevent the need for self-help on the part of Member States. But if the Commission doesn't do its job, the Member States, and in particular their courts, will – and that will signal the end of mutual trust. It may well signal the end of the European project.

As stressed by the European Parliament [in a resolution adopted on 17 September 2020](#), wasting time with more one-sided dialogue makes no sense when the actors in question have an established track record of *deliberately* acting in breach of the principle of loyal cooperation. This is instead a time for the Commission to aggressively wield its power to bring infringement actions – and with those, to ask for interim measures to prevent the situation from getting worse while the legal issues are resolved. This is necessary to prevent the situation not just from going bad to worse but to prevent the situation from going bad to beyond control. It is only a matter of time before all national courts in other EU Member States reach the same conclusion as the [Amsterdam District Court did this summer](#) by refusing to honour any European Arrest Warrant request from any Polish court. In other words, we have now a black hole in the EU legal order following the structural dismantling of the independence of all Polish courts.

The only way to contain the increasing lawlessness that we are witnessing in Poland is for your Commission to step up to the task it is given under the Treaties to enforce EU law. Do not further delay action in the name of dialogue. One simply cannot engage in dialogue with a pyromaniac who is actively adding fuel to a blaze.

First, we urge you to return to the Court of Justice to apply for a penalty payment regarding the continuing violation of its order of 8 April 2020.

Second, the Commission must urgently issue its reasoned opinion in relation to the muzzle law and give the Polish government the minimum possible time to reply. It must then seek to lodge its infringement action with the Court of Justice without delay and apply simultaneously for interim measures to neutralise the effects of the muzzle law.

Third, as recommended by the European Parliament, the Commission should launch an infringement procedure in relation to the unlawfully composed Constitutional

Tribunal; the unconstitutionally established and unlawfully composed “Chamber of Extraordinary Review” of the Supreme Court which suffers from the same lack of judicial independence as the “Disciplinary Chamber”; and act also against the similarly unconstitutionally established and unlawfully composed National Council of the Judiciary. By packaging these complaints together in a single infringement action, the comprehensive and deliberate nature of the Polish government’s attacks on the judiciary can be exposed before the European Court of Justice, which should expand its jurisprudence on judicial independence to allow a more structural remedy for this problem.

Fourth, we urge you to publicly denounce and act against the team put in place by Poland’s ruling coalition that has been harassing judges and prosecutors. As Advocate General Bobek last week argued [in the case of Asocia#ia Forumul Judec#torilor Din România](#), a body in charge of initiating disciplinary procedures against members of the judiciary should at the very least demonstrate some degree of operational and investigative independence, which is patently not the case in Poland. Without criticism from the Commission, this body will appear to be what it is not: an independent institution enforcing the law. Instead, you need to say that this body is undermining EU law by initiating disciplinary procedures that the Court of Justice has ruled are political rather than legal.

You [promised before being elected](#) that there will “*be no compromise when it comes to respecting the Rule of Law ... The Commission will always be an independent guardian of the Treaties. Lady Justice is blind – she will defend the Rule of Law wherever it is attacked.*”

The rule of law in Poland is not merely being attacked. It is being destroyed in plain sight.

We are concerned that the Commission is blind to violations of European law, when it is entrusted in the Treaties to act as the guardian of EU law.

This is the time to show you meant what you said before the reputation of your Commission is enduringly tainted by being the Commission on whose watch mutual trust was destroyed, because it failed proactively and meaningfully to defend the rule of law.

If the Commission does not fulfil its assigned role as Guardian of the Treaties, ensuring that the application of EU law is guaranteed throughout the Union, Member States will have every reason to resort to self-help to protect themselves from a politically compromised judiciary in a Member State where national judges are forbidden from enforcing EU rule of law standards.

Yours faithfully,

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